



Control Number: 51812



Item Number: 168

Addendum StartPage: 0

RECEIVED

PUC PROJECT NO. 51617

2021 MAR 12 PM 3:20

OVERSIGHT OF THE ELECTRIC
RELIABILITY COUNCIL OF TEXAS

§
§
§
§
§

PUBLIC UTILITY COMMISSION

OF TEXAS

PUC DOCKET NO. 51812

ISSUES RELATED TO THE STATE OF
DISASTER FOR THE FEBRUARY
2021 WINTER WEATHER EVENT

§
§
§
§
§

BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

MOTION TO RECONSIDER

TABLE OF CONTENTS

I.	SUMMARY OF MOTION.....	3
II.	FACTUAL BACKGROUND.....	4
	A. About the Movants.....	4
	B. February 2021 Weather Event, Load Shed, and Commission Orders.....	4
	C. Market and Public Outcry.....	8
	D. Commission Response to Complaints.....	9
III.	ARGUMENT.....	10
	A. Introduction.....	10
	B. The Commission Should Grant the Motion to Reconsider and Rescind Its Orders Entirely.....	11
	1. <i>The Commission Did Not Have the Authority to Issue the February 15 and 16 Orders.....</i>	11
	i. PURA Does Not Give the Commission Authority to Administratively Change ERCOT's Prices in this Manner.....	12
	ii. The Governor's Disaster Proclamation Does Not Give the Commission Authority to Administratively Change ERCOT's Prices in this Manner.....	14
	2. <i>Even if the Commission Had Authority, the February 15 and 16 Orders Were Procedurally Flawed.....</i>	15
	i. The February 15 and 16 Orders Did Not Comply with Contested Case Procedures.....	15

1128

ii. The February 15 and 16 Orders Did Not Comply with Rulemaking Procedures.....	16
C. In the Alternative, the Commission Must at Least Enforce its Orders to Ensure that the Artificial Price Adders are Not Imposed <i>after</i> Load Shed Directives Ended.....	19
IV. CONCLUSION AND PRAYER.....	20

MOTION TO RECONSIDER

NOW COME Bobcat Bluff Wind, LLC; TX Hereford Wind, LLC; Las Majadas Wind, LLC; Coyote Wind, LLC; Miami Wind I, LLC; Goldthwaite Wind Energy LLC; Ector County Energy Center LLC; and Pattern Energy Group LP, including its affiliate project companies, Pattern Gulf Wind LLC; Logan's Gap Wind LLC; Pattern Panhandle Wind, LLC; and Pattern Panhandle Wind 2 LLC (collectively, the "Movants"), and file this Motion to Reconsider the Commission's February 15 and 16, 2021, orders in Project No. 51617. Under the Texas Administrative Procedure Act ("APA") § 2001.146, this motion is timely filed.

In support thereof, the Movants states as follows:

I. SUMMARY OF MOTION

The Public Utility Commission of Texas ("PUC" or "Commission") issued unusual orders on February 15 and 16, 2021, abandoning electricity market pricing and artificially raising wholesale prices—which are under normal conditions on average \$22/megawatt hour ("MWh")—to a \$9,000/MWh cap for almost a week. These unprecedented orders had a devastating financial impact on many Electric Reliability Council of Texas ("ERCOT") market participants, including the Movants. The ongoing, widespread public outcry in response to the orders—in these dockets and projects, at the legislature, and in the media—reflects the extent of the adverse impacts.

The Movants therefore respectfully request that the PUC reconsider these orders and correct the artificial pricing for the entire time period in which they were issued. The Commission lacked authority under PURA or under the Governor's disaster proclamation to make these decisions in this manner, and the orders failed to follow any of the procedures required by Texas law, so they must be rescinded. In addition and/or alternative to the above request, ERCOT extended the \$9,000/MWh pricing for approximately 32 hours after it should have been terminated

under the Commission's orders. The Movants request that, at the very least, ERCOT's error be corrected after load shed ended, consistent with the calls of state elected officials, the Commission's own Independent Market Monitor ("IMM"), and dozens if not hundreds of market participants.

II. FACTUAL BACKGROUND

A. About the Movants

Bobcat Bluff Wind, LLC; TX Hereford Wind, LLC; Las Majadas Wind, LLC; Coyote Wind, LLC; Miami Wind I, LLC; Goldthwaite Wind Energy LLC; Ector County Energy Center LLC; and Pattern Energy Group LP, including its affiliate project companies, Pattern Gulf Wind LLC, Logan's Gap Wind LLC, Pattern Panhandle Wind, LLC, and Pattern Panhandle Wind 2 LLC, are the developers, owners, and/or operators of a diverse mix of energy resources in ERCOT, including natural gas, solar, and wind generation resources. They are active participants in the ERCOT market.¹ Each Movant has experienced significant adverse financial impacts as a result of the Commission's orders due to the inflated costs the Movants had to bear in order to comply with bilateral obligations directly tied to the market clearing price of energy in the ERCOT market. But for ERCOT's implementation of the Commission's orders, the magnitude of the adverse financial impacts of the Winter Weather Event on Movants would have been significantly less than what occurred as a result of the Commission's orders.

B. February 2021 Weather Event, Load Shed, and Commission Orders

In February, Texas experienced record-setting severe winter weather across the entire state. Governor Abbott declared a state disaster for all Texas counties on February 12, 2021.²

¹ While contested case formalities have not been followed in this proceeding, the Movants are "parties" to here with standing to participate in that they have justiciable interests which have been adversely affected by this proceeding, as contemplated by Subchapter F of the Commission's procedural rules.

² See Exhibit A at 1.

Unprecedented winter power usage occurred simultaneous with weather-related natural gas and power delivery failures; natural gas prices soared, causing the cost to produce electricity increased dramatically. At the same time, transportation and communication challenges compounded the power and gas delivery problems and impeded solutions. The result was that energy demand in the ERCOT exceeded available supply beginning overnight February 14 – 15, 2021. ERCOT declared its highest state of emergency, Emergency Energy Alert Level 3 (“EEA3”) and ordered curtailment over 10,000 MW of firm load.³

In response to the ERCOT load shed and the market pricing resulting from the application of ERCOT’s protocols, the Public Utility Commission issued orders administratively adjusting pricing in the ERCOT market.

First, at an emergency meeting on February 15, 2021, the Commission issued an order, attached hereto as **Exhibit A** and styled *Order Directing ERCOT to Take Action and Granting Exception to Commission Rules*, observing that “[e]nergy prices should reflect the scarcity of the supply.” While all three Commissioners expressed some trepidation with respect to taking such broad action,⁴ the Commissioners nonetheless ordered the following:

1. “[T]he Commission directs ERCOT to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals. The Commission further directs ERCOT to correct any past prices such that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals.”

³ *See id*

⁴ Open Meeting Tr, at 3:11-12 (Feb. 15, 2021) (Comm’r D’Andrea: “I didn’t like the idea of just sort of blindly moving money from one pocket to another”), 3:22 (Comm’r Botkin: “[T]hese changes are – they are a big deal”), and 4:12-13 (Chairman Walker: “I think this is something we’ve kind of wrestled with in the past . . . this will send some incorrect signals too”).

2. “ERCOT shall suspend any use of the [low system-wide offer cap] LCAP until after the Commission’s regularly-scheduled next open meeting, and that ERCOT shall continue to use the HCAP [\$9,000/MWh] as the system-wide offer cap until that time.”⁵

The next day, the Commission reconvened in a second emergency meeting and issued a new order, styled the *Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules*. This second order rescinded the February 15 order to the extent it was retroactive. In changing course so quickly, Chairman Walker acknowledged that part of the previous day’s order was issued “in haste and – and probably incorrectly.”⁶ Commissioner Botkin admitted they made a “hard decision” the previous day and abstained from the second order.⁷ Ultimately, the February 16 order, attached hereto as **Exhibit B**, retained the directives to ERCOT (1) to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals and (2) to use the HCAP for so long as load was being shed, but the order required that the Commission’s “directive to ERCOT in its order dated February 15 to also correct any past prices to account for load shed in EEA3 ... is hereby rescinded.” The second order directed “ERCOT to not correct any such past practices,” meaning that the directive “to ensure that firm load that is being shed in EEA3 is accounted for in ERCOT’s scarcity pricing signals” began at the effective date and time of the prior order, February 15 at 10:15 p.m.⁸ ERCOT implemented the Commission’s order through an adjustment to the Real-Time Reliability Deployment Price Adder.⁹

⁵ Exhibit A at 2.

⁶ Open Meeting Tr. at 2:16 (Feb. 16, 2021).

⁷ Open Meeting Tr. at 5:19-20 (Feb. 16, 2021).

⁸ Exhibit B at 2; ERCOT Notice M-C021521-02 *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at http://www.ercot.com/services/comm/mkt_notices/archives/5221.

⁹ ERCOT Notice M-C021521-01, *Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at http://www.ercot.com/services/comm/mkt_notices/archives/5196, and ERCOT Notice M-C021521-02, *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at http://www.ercot.com/services/comm/mkt_notices/archives/5221.

Days later, on February 17, at 9:24 p.m., ERCOT provided an update regarding its implementation of the Commission's order and adjustment to the price adder and stated, "Once ERCOT is no longer instructing firm Load shed, the adjustment will be set to 0".¹⁰ Later that evening, at 11:55 p.m., ERCOT rescinded all load shed instructions. However, it was not until almost 8 hours later, at 7:46 a.m. on February 18, that ERCOT provided notice that it had deviated from the Commission's orders and its prior representations. At that time, ERCOT stated, "While ERCOT has authorized all Transmission and Distribution Service Providers to restore all Load associated with the EEA that was declared on Monday, February 15, 2021, many customers have not yet been re-energized. As a result, ERCOT will remain in EEA3 through at least the morning peak period on Friday, February 19, 2021."¹¹ ERCOT further changed the duration of the Commission-ordered administrative pricing to extend until ERCOT exited EEA3.¹² The Commission did not issue an order to authorize this change in ERCOT's implementation processes. While there were increasing reserve levels reported throughout the day on February 18, underscoring the lack of load shed from the morning of February 17 forward,¹³ ERCOT remained in EEA3 and continued imposing administrative price adders to set the real-time settlement point price at the administratively set HCAP of \$9,000/MWh until after 9:00 a.m. on February 19, 2021.

¹⁰ ERCOT Notice M-C021521-03 *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at http://www.ercot.com/services/comm/mkt_notices/archives/5224.

¹¹ ERCOT Notice M-C021521-04 *Update: Emergency Order of the Public Utility Commission Affecting ERCOT Market Prices*, available at http://www.ercot.com/services/comm/mkt_notices/archives/5225.

¹² *Id.*

¹³ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Texas Energy Association of Marketers ("TEAM") Emergency Request to Enforce Commission Order at 4 (Feb. 19, 2021) (noting that by 12:30 p.m. on February 18th, ERCOT was carrying over 10,500 MWs of reserves; by 4:45 p.m., ERCOT was carrying over 16,000 MWs of reserves—yet ERCOT did not remove the administrative price adders until February 19th at 9:00 a.m.).

C. Market and Public Outcry

Since those Commission orders and that ERCOT activity, a plethora of market participants have implored the Commission to take emergency action to correct some or all of its artificial pricing actions and “to remove the administrative price adders that set prices to \$9,000/MWh.”¹⁴ At least one market participant has noticed an immediate appeal of the Commission’s orders to the Third Court of Appeals.¹⁵ Another filed a complaint against ERCOT with the Commission.¹⁶

Market participants are not the only entities who have expressed alarm at the Commission’s market interference. Potomac Economics, which serves as the Independent Market Monitor (IMM), has recommended specifically that the Commission “remove the inappropriate pricing intervention” on February 18 – 19, 2021 (the time period after ERCOT ended the load shed but before it removed the administrative price adder), among other recommendations.¹⁷

¹⁴ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, EDF Renewable Energy Request for Emergency Action at 1 (Mar. 1, 2021); *see also, e.g.*, requests for emergency action, letters, and/or comments by TEAM (Feb. 19, 2021); BPR OP, LP, City of Baytown, City of Rosenberg, Creative Specialty Foods Inc., Crownmark Imports, United Minerals and Properties, Inc. dba Cimbar Performance Minerals Inc., City of Round Rock, Chisos Logistics, Kyocera Document Solutions America, Inc., Arandas Bakery, Harbor Freight Tools USA, Inc., Lincoln Rackhouse, Best Press Inc., Leslie’s Poolmart, Inc., NET Power, LLC, Stratas Foods LLC, Alamo Crossing, LLC, B&B Theatres Operating Co., Inc., IKO Southwest Inc., KRM 505 Sam Houston LLC, KRM 525 Sam Houston LLC, McCoy Corporation, NW Crossings Management LLC, Overwraps Packaging, Inc., Rojan, Inc., SanMar Corporation, Suffolk Business Solutions, VRE Properties LLC, Webster Surgical Specialty Hospital, LTD, Bixby Enterprises, Explorer Pipeline Company, G&H Diversified Manufacturing, RS 4606 FM 1960 LLC, Blue Line Distribution, Redoak Drive LLC, Cryoport Systems, Data Foundry, Huhtamaki, Inc. (Feb. 22, 2021); Pattern Energy Group (Feb. 25, 2021); Bell Textron, Inc. (Mar. 1, 2021); GridPlus Texas Inc., LPT LLC (aka Liberty Power), Summer Energy LLC, ATG Clean Energy Holdings Inc., Volt Electricity Provider LP, Brooklet Energy Distribution LLC, Pogo Energy LLC, Alliance Power Company LLC, 3000 Energy Corp. (aka Penstar Power), Bulb US LLC 174, Power Global Retail Texas LLC (aka Chariot Energy) (Mar. 2, 2021); GridPlus Texas Inc. (GridPlus) LPT LLC (Liberty Power) Summer Energy LLC ATG Clean Energy Holdings Inc. Volt Electricity Provider LP Brooklet Energy Distribution LLC Pogo Energy LLC Alliance Power Company LLC 3000 Energy Corp. (Penstar Power) Bulb US LLC 174 Power Global Retail Texas LLC (Chariot Energy) (Mar. 2); Enbridge Inc. (Mar. 8, 2021); and at least 18 electric cooperatives as of the time of this motion.

¹⁵ *Luminant Energy Co. LLC v. Pub. Util. Comm’n of Tex.*, Cause No. 03-21-00098-CV (Tex. App.—Austin, notice of appeal filed Mar. 2, 2021).

¹⁶ *Complaint of DGSP2, LLC Against the Electric Reliability Council of Texas, Inc.*, Docket No. 51874 (Mar. 5, 2021).

¹⁷ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Second Letter from Potomac Economics (Mar. 4, 2021). The IMM continued to support this position in its subsequent filing on March 11, 2021. *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Third Letter from Potomac Economics (Mar. 11, 2021).

Texas Senators, Representatives, the Lieutenant Governor, and other elected officials have expressed their grave concerns to the Commission in writing, with some noting “a staggering number of market participants” affected by the repricing and citing the bankruptcy of the state’s oldest electric cooperative.¹⁸ The governor appears to share their concerns; on March 9, 2021, Governor Abbott declared the following a legislative priority:

Legislation relating to the correction of any billing errors by the Electric Reliability Council of Texas (ERCOT), including any inaccurate excessive charges and any issues regarding ancillary service prices.

19

D. Commission Response to Complaints

The Commission acknowledged some of the widespread industry concerns at its March 5, 2021 open meeting.²⁰ The Commission directed its Staff to open a rulemaking and issue a request

¹⁸ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Letters from Senator Drew Springer (Mar. 5, 2021) (“Numerous parties have petition the PUCT to find another solution other than letting prices automatically be set at \$9000 for the whole week or for parts of the week, including TEAMS and the Independent Market Monitor (IMM). According to the IMM, **because ERCOT held prices at the value of lost load (VOLL) by inflating the Real-Time On-Line Reliability Deployment Price Adder, \$16 billion in additional costs were added to the market.**”) (emphasis in original); Senator Beverly Powell (Mar. 5, 2021); Representative Drew Darby and Representative Tom Craddick (Mar. 9, 2021) (quoted, referencing the bankruptcy of Brazos Electric Cooperative, Inc., which was filed in the Northern District of Texas on Mar. 1, 2021); Lieutenant Governor Dan Patrick (Mar. 10, 2021) (“Correcting this \$16 billion error will require an adjustment, but it is the right thing to do.”). On March 11, 2021, the IMM refined her original estimate by netting transactions at the corporate level, which resulted in a revised estimate that the IMM’s “recommendations would alter the ERCOT settlements by a total of \$5.1 billion. *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Third Letter from Potomac Economics (Mar. 11, 2021).

¹⁹ Legislative Message from Greg Abbott, Governor of Tex., Office of the Governor, to the Senate and House of Representatives of the 87th Tex. Legislature, Regular Session, (Mar. 9, 2021) (available at https://gov.texas.gov/uploads/files/press/EMERG_MESSAGE_legislative_matter_repricing_electricity_FINAL_03-09-21.pdf).

²⁰ Open Meeting Tr. at 18:18-30:17 and 40:2-3 (Mar. 5, 2021) (Chairman D’Andrea noted, “[W]e’ve got a bunch of repricing requests from the IMM. ... [T]he IMM raised some good points, and I think they’re very interesting. And so we definitely should consider them.” But he ultimately decided, “I’m not inclined to do it [reprice] today ... it’s just nearly impossible to unscramble this sort of egg...”; Comm’r Botkin agreed, saying “the energy market is the one that has the deadline today, and I say we don’t act.”).

for comments addressing potential adjustments to Commission rules regarding adjustments of the LCAP.²¹

However, the Commission did *not* grant the IMM's recommendation on March 5, and it has taken no further action to withdraw, clarify, or enforce its February 15 and 16 orders and correct the artificial market prices created by those orders.

III. ARGUMENT

A. Introduction

The Movants appreciate that the Commission has initiated a rulemaking in Project No. 51871 and they intend to participate therein. Unfortunately, any action taken in that rulemaking can apply only prospectively. Thus, an amended rule could only correct pricing concerns for future events. Any action taken in that rulemaking proceeding will leave the significant February pricing issues uncured — at substantial harm to market participants like the Movants that acted in good faith during the unprecedented winter storm.

Therefore, the Movants respectfully request reconsideration and ask that the Commission rescind its February 15 and February 16, 2021, orders and reverse the artificial administrative price adder that was imposed from February 15 - 19, 2021.

To the extent the Commission declines to reconsider its orders in their totality, then in the alternative, the Movants request that the Commission clarify/enforce those orders and require ERCOT to remove the administrative price adder from 12:00 a.m. on February 18, 2021 to 9 a.m. on February 19, 2021. At the very least, and consistent with the Commission's orders, no

²¹ *Review of the ERCOT Scarcity Pricing Mechanism*, Project No. 51871, Request for Comments on the Low System-Wide Offer Cap (Mar. 8, 2021), asking for up to 10 pages of comment by March 19, 2021 and five pages of reply comments by March 26, 2021 on the following questions:

1. Should the Commission amend its rules to adjust the LCAP?
2. If the Commission amends its rules to adjust the LCAP, what specific adjustments should it make?
3. If the Commission amends its rules to adjust the LCAP, when should these adjustments take effect?

administrative price adders should have been imposed after load shed instructions were lifted. This is consistent with the recommendation of the IMM, requests by state leaders, and requests of dozens of market participants.²² “[E]very minute of out-of-market pricing that was imposed in contravention of the Commission’s Order, when no load shed was ordered, costs the market and costumers millions of dollars and does irreversible harm.”²³

B. The Commission Should Grant the Motion to Reconsider and Rescind Its Orders Entirely

1. The Commission Did Not Have the Authority to Issue the February 15 and 16 Orders

On February 16, when deciding to rescind part of the February 15 order, now-Chairman D’Andrea said, “I’ve said before, I really don’t like repricing at all, and I think we should generally move away from it unless we can – we hear that it’s really justified in a lot of situations. I think it’s very disruptive. . .”²⁴ Although on that date the Commission agreed to keep its prospective administrative price adder in place, Chairman D’Andrea again reflected upon the complexity of this market interference on March 5, when he stated, “it’s just nearly impossible to unscramble this sort of egg, and the results of going down this path are unknowable.”²⁵

The Movants appreciate that the Commissioners felt the great weight of their decisions.²⁶ The Movants also understand the urgency and pressure to act in real time to try to help bring more generation online during the storm. However, artificially adjusting the pricing in ERCOT was not a narrowly tailored means, or an effective one, to achieve that end; this drastic measure unfairly created winners and losers in the market. The Commission lacks the authority to unilaterally reset

²² See *supra* n.14 and 18.

²³ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, TEAM Emergency Request to Enforce Commission Order at 1 (Feb. 19, 2021).

²⁴ Open Meeting Tr. at 4:1-4 (Feb. 16, 2021).

²⁵ Open Meeting Tr. at 30:15-17 (Mar. 5, 2021).

²⁶ Open Meeting at 3:22 and 4:1-2 (Feb. 15, 2021) (Comm’r Botkin: “[T]hese changes are – they are a big deal”; Chairman Walker: “Yeah. I mean, these are – are a big deal. . .”).

pricing in this manner, even during times of disaster. The Commission does not have the authority to pass *ad hoc* rules, make decisions that violate ERCOT protocols and its own rules, and change billions of dollars in pricing, without even granting market participants the meaningful notice or due process that correct procedures might have offered. While some market participants have indicated in filings with the Commission that they took action based on the Commission's orders and ERCOT's reinterpretation of the Commission's orders, others, like the Movants, were not able to change their position in the market in the face of quick administrative changes to Commission rules and ERCOT protocols that had been promulgated after long deliberation and with extensive market participant input.

i. PURA Does Not Give the Commission Authority to Administratively Change ERCOT's Prices in this Manner

In the February 15 and 16 orders, the Commission cited PURA § 39.151(d) and 16 TAC § 5.501(a) as grounds for its authority to adjust ERCOT pricing. It is axiomatic that the Commission's authority is granted by the legislature, and consequently the legislature determines the boundaries of this authority as well.²⁷

The orders cite PURA § 39.151(d) as granting the Commission "complete authority" over ERCOT, but in truth the legislature qualified that phrase in the statute:

The commission has complete authority to **oversee and investigate** the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties. (emphasis added).

When read in context, the scope of authority provided by this statute is more prescribed and constrained than the Commission's orders imply. The Commission has complete authority to "oversee" ERCOT, not to run ERCOT. This statute does not give the Commission the ability to

²⁷ See *Pub. Util. Comm'n of Tex v Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315–16 (Tex. 2001); *Pub Util. Comm'n v GTE-Southwest, Inc.*, 901 S.W.2d 401, 406–07 (Tex. 1995).

step in ERCOT's shoes, grant exceptions to rules, modify protocols, and artificially change prices, as was done on February 15 and 16, 2021.

ERCOT protocols are developed and approved with long deliberation and input by market participants. Those protocols work alongside the Commission's own market rules, which are also promulgated with careful deliberation and extensive stakeholder participation, consistent with the APA's notice and other requirements for rulemakings. It is critical that the Commission adopts, maintains, and stands by ERCOT's protocols and the Commission's rules. It is crucial that the Commission issues orders consistent with ERCOT's protocols and the Commission's rules. That regulatory certainty is vital to the market.

The Commission's decisions on February 15 and 16 are examples of regulatory *uncertainty*. Although repricing may be considered a market disruption, the Commission did not have the authority to grant exceptions to its rules and the ERCOT protocols and unilaterally impose drastic market changes under these circumstances—changes that had ten- to eleven-figure consequences to the state. *Ad hoc* repricing makes it difficult for market participants to model or prepare for future events.

The Commission also cited 16 TAC § 25.501 in its order. This rule may permit the Commission to direct market clearing prices of energy and other ancillary services in the ERCOT market, but the Commission cannot confer itself additional and greater authority through rules than has been granted by the legislature; the Commission cannot act with authority it does not possess.²⁸ 16 TAC § 25.501 enables, for example, the Commission to set the HCAP and the LCAP, but this rule does not allow the Commission to unilaterally alter pricing at a moment's notice and without providing notice due under law, even during a disaster.

²⁸ See *id.*

ii. The Governor's Disaster Proclamation Does Not Give the Commission Authority to Administratively Change ERCOT's Prices in this Manner

As referenced above, on February 12, 2021, Governor Abbott issued a Proclamation, which states in pertinent part:

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster

29

While this proclamation broadly suspends “any regulatory statute . . . or any order or rule of a state agency,” the proclamation is not applicable to the Commission’s February 15 and 16 orders for the two reasons set forth below.

First, while the February 15 and 16 orders do not on their face expressly suspend or amend ERCOT protocols, there can be no question that myriad ERCOT protocols were affected by the orders. ERCOT is non-profit organization and an “independent organization” certified by the Commission under PURA, not a state agency.³⁰ Therefore, its protocols are not regulatory statutes or orders or rules of a state agency. To the extent ERCOT protocols were implicated by the February 15 and 16 orders, the orders were not within the scope of the Governor’s disaster proclamation.

Second, even setting aside the issue of ERCOT protocols not being subject to suspension under the disaster proclamation, the proclamation requires that the Governor provide written approval of the suspension of such statutes, orders, or rules. The Commission’s orders expressly

²⁹ *Governor Abbott Issues Disaster Declaration in Response to Severe Winter Weather in Texas*, OFF. OF THE TEX. GOVERNOR (Feb. 12, 2021), <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-in-response-to-severe-winter-weather-in-texas>.

³⁰ APA § 2001.002(7).

grant waivers of the Commission's own rules on the basis of the disaster proclamation, but the orders do not reflect that the Governor provided any such written approval.

Consequently, as a result of these issues, the Governor's Disaster Proclamation does not confer the authority the Commission needed to issue the February 15 and 16 orders.

2. Even if the Commission Had Authority, the February 15 and 16 Orders Were Procedurally Flawed

Even assuming *arguendo* that the Commission had the legal authority to act on February 15 and 16, the orders do not follow the statutory procedures for state agency action.

The purpose of the APA is to "provide minimum standards of uniform practice and procedure for state agencies."³¹ To that end, the APA provides two means for state agencies to act: either (1) through "contested cases," which are proceedings "in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing"³²; or (2) by rule, which is "a state agency statement of general applicability that ... implements, interprets, or prescribes law or policy" or "describes the procedure or practice requirements of a state agency" including "the amendment or repeal of a prior rule."³³ Whichever set of procedures one might apply to the February 15 and 16 orders, they fall short.

i. The February 15 and 16 Did Orders Not Comply with Contested Case Procedures

The APA sets forth very specific requirements under which contested cases must proceed. Among those requirements are notice and the opportunity to be heard:

³¹ APA § 2001.001(1).

³² APA § 2001.003(1).

³³ APA § 2001.003(6).

SUBCHAPTER C. CONTESTED CASES: GENERAL RIGHTS AND PROCEDURES

Sec. 2001.051. OPPORTUNITY FOR HEARING AND PARTICIPATION; NOTICE OF HEARING. In a contested case, each party is entitled to an opportunity:

- (1) for hearing after reasonable notice of not less than 10 days; and
- (2) to respond and to present evidence and argument on each issue involved in the case.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Unfortunately, no affected market participant was afforded any meaningful notice or any opportunity to be heard here, when the Commission acted with just a few minutes' deliberation in very brief, emergency open meetings. "Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner."³⁴ In other words, the Commission's hasty actions denied market participants the very due process rights that procedural laws such as the APA are designed to protect.

ii. The February 15 and 16 Orders Did Not Comply with Rulemaking Procedures

The APA is similarly specific requirements about the procedures for rulemakings, which include, among other things, 30 days' notice, publication in the *Texas Register*, and an opportunity for public comment:

Sec. 2001.023. NOTICE OF PROPOSED RULE. (a) A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule.

(b) A state agency shall file notice of the proposed rule with the secretary of state for publication in the *Texas Register* in the manner prescribed by Chapter 2002.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

³⁴ *Tex. Workers' Comp. Comm'n v Patient Advocates*, 136 S.W.3d 643, 658 (Tex. 2004) (also noting "A deprivation of personal property without due process violates the United States and Texas Constitutions"); *see also* U.S. CONST. amend. XIV and TEX. CONST. art. I, § 19.

Sec. 2001.029. PUBLIC COMMENT. (a) Before adopting a rule, a state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing.

(b) A state agency shall grant an opportunity for a public hearing before it adopts a substantive rule if a public hearing is requested by:

- (1) at least 25 persons;
- (2) a governmental subdivision or agency; or
- (3) an association having at least 25 members.

(c) A state agency shall consider fully all written and oral submissions about a proposed rule.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Again, none of these formalities were followed here. No affected market participant was afforded any meaningful notice or opportunity to provide comments before the Commission acted. Instead, the Commission amended its rules *ad hoc*.

“*Ad hoc* rulemaking occurs when the agency makes a determination that has implications beyond the instant parties, but prefers not to make a formal rule ... An *ad hoc* rule is an agency statement that interprets, implements, or prescribes agency law or policy.”³⁵ There can be no question that the February 15 and 16 orders prescribed agency policy—they expressly waive portions of Commission rules—and they were issued without any attempt to follow any of the procedural requirements for rulemakings. The APA prohibits any state agency from *ad hoc* rulemaking and rewriting or reinterpreting its own rules without undergoing the formal rulemaking process.

The APA does contain exceptions to notice/hearing requirements for an “emergency rulemaking,” but they do not apply here. Namely, to adopt an emergency rule, the agency must state in the emergency rule that it found “an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires the adoption of a rule on fewer than 30 days’

³⁵ *CenterPoint Energy Entex v R.R. Comm’n*, 213 S.W.3d 364, 369 (Tex. App.—Austin 2006, no pet.) (internal citations omitted).

notice.”³⁶ Emergency orders must also be published in the *Texas Register*.³⁷ Here, while the orders reference the disaster, they are not characterized as emergency rules; they do not set forth any imminent peril to public health, safety, or welfare; and they have not been published in the *Texas Register*.

Had the Commission found its existing rules lacking during this disaster, then it should have issued a notice and proceed with a proper rulemaking, as it is now doing in Project No. 51871. If the Commission’s rules are amended in that rulemaking, then the new rules will apply prospectively, and market participants will know what the rules are and how they will be applied *before* the next natural or other disaster. In other words, the proper course when the Commission takes issue with one of its properly promulgated rules is to start the process to amend it, *not* to simply ignore it. The Commission cannot issue *ad hoc* orders that contravene its existing rules as it did on February 15 and 16.

Note that the Commission had options to act to reduce the load shed that were within its rules and ERCOT protocols. For example, ERCOT protocols contemplate that fuel or other variable costs may at times exceed the price of electricity and allow ERCOT to dispatch that power out of merit and hold the generator harmless. The Commission and ERCOT did not use this Reliability Unit Commitment (“RUC”) process here. Such narrowly tailored actions not only would have been procedurally correct, but also consistent with market expectations as they would have been based on existing rules and protocols. They also might have been more effective than the overbroad pricing action the Commission took.

The Commission cannot now travel back in time and attempt a more narrowly-tailored option consistent with its rules to more quickly end load shed during the February 2021 winter

³⁶ APA § 2001.034(a) and (b).

³⁷ APA § 2001.034(d).

disaster, but it *can* retroactively mitigate the false pricing it imposed without authority and without proper procedure by reconsidering its orders and correcting the artificial pricing for the entire time period in which those orders were in effect. The market distortions the Commission imposed have cost Texas billions and need to be corrected.

C. In the Alternative, the Commission Must at Least Enforce its Orders to Ensure that the Artificial Price Adders are Not Imposed *after* Load Shed Directives Ended

Even if the Commission declines to reconsider the orders in their entirety, at the very least, it must then narrowly enforce those orders and raise prices only during the time when load shed was occurring. This enforcement would help mitigate some of the disruptive impacts of the orders.

The Commission's orders instructed ERCOT to impose an artificial price adder "when we're in load shed,"³⁸ yet ERCOT allowed the adders to remain for approximately 32 hours after it ended its load shed directives.

This time period may appear brief in the context of the lengthy storm, but every minute truly matters at a \$9,000/MWh price. As calculated by the IMM, this 32 hours of artificially high pricing cost the market up to eleven-figures.³⁹ Market participants, including Movants, were impacted in a variety of ways depending on their circumstances. The administratively set pricing impacted the magnitude of various ERCOT charges to market participants as well as transactions that are outside the ERCOT settlement process but that are directly driven by and impacted by ERCOT market prices. ERCOT has issued collateral calls to market participants that were unduly inflated based on these erroneous prices. Immediate action is necessary to avoid further

³⁸ Open Meeting Tr. at 4:8 (Feb. 15, 2021).

³⁹ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Potomac Economics' Follow Up Letter (Mar. 11, 2021).

irreversible defaults and other adverse market impacts associated with pricing that was inconsistent with the Commission's own orders.

For all of the above reasons, we urge the Commission to instruct ERCOT to remove the administrative price adders that set prices to \$9,000/MWh from, at the very least, the time ERCOT reduced the firm load shed to zero on the grid (approximately 12:00 a.m. on February 18, 2021) to the time ERCOT finally removed the administrative price adder (9:00 a.m. on February 19, 2021).

IV. CONCLUSION AND PRAYER

Movants pray and respectfully request that the Commission grant the Movants' motion to reconsider and take actions as they are necessary to mitigate irreparable financial damage:

- Rescind the Commission's February 15 and 16 orders and remove the administrative adder from 10 p.m. February 15 to 9 a.m. February 19, 2021; or
- In the alternative, clarify / enforce the February 15 and 16 orders and remove the administrative adder from 12:00 a.m. February 18 to 9 a.m. February 19, 2021.

It is imperative that ERCOT prices reflect the Commission's clear directives as promptly as possible, as collateral calculations are ongoing and depend on this pricing. Again, every minute counts in these conditions.

Respectfully submitted,



By: _____

Michael J. Jewell
Jewell & Associates, PLLC
State Bar No. 10665175
8404 Lakewood Ridge Cove
Austin, TX 78738-7674
(512) 423-4065
(512) 236-5170 (FAX)
michael@jewellandassociates.com

Attorneys for Bobcat Bluff Wind, LLC; TX Hereford Wind, LLC; Las Majadas Wind, LLC; Coyote Wind, LLC; Miami Wind I, LLC; Goldthwaite Wind Energy LLC; Ector County Energy Center LLC; and Pattern Energy Group LP, including its affiliate project companies, Pattern Gulf Wind LLC, Logan's Gap Wind LLC, Pattern Panhandle Wind, LLC, and Pattern Panhandle Wind 2 LLC

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing has been served by email on all parties of record who have provided an email address on this the 12th day of March 2021, in accordance with the Commission's Second Order Suspending Rules, issued on July 16, 2020, in Project No. 50664.


